

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 62229-3-I
)	
Respondent,)	
)	
v.)	
)	
JOSEPH BLUE,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: March 15, 2010
)	

Ellington, J. — Joseph Blue was convicted of rape in the first degree and second degree assault for beating, strangling, and forcing sex upon his then girlfriend. Over his objection, the court allowed the State to introduce evidence that Blue committed similar assaults on previous occasions against the same victim as well as two other women. Blue appeals his convictions, contending the court erred by admitting evidence of the prior bad acts. Finding no error, we affirm the rape conviction. But because Blue correctly asserts the assault conviction should have merged into the rape conviction, and because the court improperly imposed two conditions of community custody, we remand.

BACKGROUND

In August 2007, Joseph Blue and Jessica Clark were involved in a romantic relationship. One night Blue became very agitated. He was suspicious of Clark's

recent contacts with her ex-husband, with whom Blue had forbidden Clark to communicate. Blue had consumed two large bottles of malt liquor, cocaine, and was taking Vicodin for a recently broken arm. He told Clark to prepare a marijuana pipe for him, but Clark did not immediately comply. Blue also suggested novel sexual activity, which Clark refused. Blue became enraged, struck Clark, held her down, and strangled her with his uninjured arm.

Over the course of that night and the next morning, Blue repeatedly hit, kicked, and bit Clark, restricted her breathing by pushing on her throat and chest, dragged her around by her hair, pushed his thumbs into her eyes, whipped her with a belt, and urinated on her. Blue also forced Clark to perform oral sex on him and penetrated her vaginally while pushing her face into a pillow so that she was unable to breathe. When she struggled and tried to get air, he punched her face and strangled her with both hands until she lost consciousness and bladder control. Blue forced Clark to take some of his Vicodin and she eventually blacked out. Blue roused her by biting and hitting her. Throughout the assault, he called her demeaning names. Blue told Clark he hated her, threatened to kill her, said she did not deserve to live, and repeatedly forced her to say she was a “dirty whore.”¹

The following morning, Clark told Blue her grandmother was on her way to their house to drop off Clark’s daughter. Blue called his brother for a ride and instructed Clark to put on makeup to cover her injuries. When he left, Clark called her grandmother and mother and told them Blue had beaten her. Clark’s mother told her to

¹ Report of Proceedings (RP) (July 9, 2008) at 149.

call 911, which she did. Her grandmother drove Clark to the hospital after police arrived.

When police contacted Blue, he denied assaulting Clark and claimed the bites were part of consensual sex. When asked about Clark's other apparent injuries, Blue said, "Well I don't know what she did to herself."² Blue was arrested and charged with first degree rape and second degree assault.

Before trial, the State moved in limine to admit evidence of Blue's prior assaults on Clark and two other women. Specifically, the State wished to show that Blue had strangled Clark on one other occasion and had beaten and raped his ex-wife and a former girlfriend under similar circumstances. The State argued the evidence was admissible to show a common scheme or plan, motive, or to rebut Blue's possible defense of mistake or accident.

The State's offer of proof indicated that in each of the prior instances, Blue was intoxicated and reacted violently to a perceived loss of control of his relationship or his partner. Police reports and declarations showed that Blue beat, smothered, and forced sex upon his ex-wife Katie Barella when she accepted a drink from a male friend after refusing one from Blue, and beat, choked, and raped his former girlfriend Amy Banta when she complained about him flirting with other women. The State also offered evidence that Blue had strangled Clark once before when she refused to perform oral sex. In each case, Blue called the women demeaning names including "bitch," "slut," "whore," and "cunt." The State argued the similarities between the attacks

² Clerk's Papers at 193.

demonstrated Blue's common scheme or plan to maintain control over the women with whom he is involved through violence, humiliation, and subjugation.

Over Blue's objection, the court granted the State's motion. In a lengthy written ruling, the court cataloged substantial similarities between the incidents and concluded the evidence was admissible to show Blue's motive, lack of mistake or accident, and common scheme or plan. The court instructed the jury to use the evidence for no other purpose.³

The jury convicted Blue as charged. The court concluded that the assault merged into the conviction for first degree rape, but nonetheless included the assault in the judgment and imposed a separate sentence for it.

DISCUSSION

Prior Bad Acts

Blue contends the court erred by allowing the State to present evidence of his prior assaults as evidence of a common scheme or plan under ER 404(b). We review the interpretation of an evidentiary rule de novo.⁴ "Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion."⁵ A trial court abuses its discretion when its decision is manifestly

³ Clerk's Papers at 229 ("Evidence has been introduced in this case on the subject of an alleged prior assault on Jessica Clark . . . , and alleged prior assaults on the defendant's ex-wife Katherine Barella, and an alleged prior assault on the defendant's ex-girlfriend Amy Banta for the limited purpose of proving a common scheme or plan and to prove absence of mistake or accident. You must not consider this evidence for any other purpose.").

⁴ State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

⁵ Id.

unreasonable or based on untenable grounds.⁶ “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the

⁶ State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.”⁷

Evidence of prior bad acts is presumed to be inadmissible.⁸ ER 404(b) prohibits admission of evidence to prove a defendant has a criminal propensity:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To admit prior acts under one of the exceptions, the State must meet a substantial burden. Our Supreme Court established the analysis for admission of evidence of prior bad acts to prove a common scheme or plan in State v. Lough.⁹ The prior acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.”¹⁰ Moreover, “the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.”¹¹ The degree of similarity must be substantial, but the level of similarity does not require the evidence of common features

⁷ In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

⁸ DeVincentis, 150 Wn.2d at 17.

⁹ 125 Wn.2d 847, 889 P.2d 487 (1995).

¹⁰ Id. at 852.

¹¹ Id. at 860.

to show a unique method of committing the crime.¹² “[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.”¹³

The court found the prior assaults substantially similar to Blue’s attack on Clark:

In the alleged assaults, the defendant was involved in a serious romantic relationship with Clark, Barella, and Banta. The defendant was intoxicated or using a variety of drugs in each incident. The defendant became angry when his relationship was threatened or when he was losing his control over the relationship He called the women demeaning names, dragged at least two of the victims by the hair, choked the alleged victims causing them to become unconscious or to being close to unconsciousness, and allegedly raped them orally, vaginally, and anally. The defendant reportedly ordered Clark to clean herself up after the assault and ordered Banta to clean the blood off her face so others would not see it.

As noted by the prosecutor, the testimony of Barella and Banta “proves the common scheme or plan of using violence and creating the fear of the death through suffocation to demean and humiliate those with whom the defendant is insecure about his romantic relationship. He then further humiliates his victims through sexual assaults and calling names impugning their honor and morals like ‘cunt,’ ‘bitch,’ and ‘whore.’” State’s Motion in Limine, page 10, lines 16–20.

The court finds that there are substantial similarities between the charged crimes and the prior bad acts for the purposes of showing a common scheme or plan. Further, the court finds the evidence is relevant to show the defendant’s motive and absence of mistake or accident.^[14]

Blue does not dispute that the prior acts were proven by a preponderance of the evidence, relevant to prove an element of the crime, and more probative than prejudicial. He argues the prior acts do not evidence a scheme or plan, but merely a propensity to react violently when angered.

¹² DeVincentis, 150 Wn.2d at 20–21.

¹³ Id. at 13.

¹⁴ Clerk’s Papers at 306.

Blue attempts to distinguish the seminal cases on the common scheme or plan exception because in those cases the evidence indicated the defendants deliberately utilized a particular strategy to accomplish their crimes. In Lough, the defendant, a paramedic, used his familiarity with medications to drug women he knew and rape them while they were unconscious.¹⁵ In DeVincentis, the defendant followed a certain set of steps to molest two different girls: he befriended them, desensitized them to nudity by wearing only underwear in their presence, encouraged the girls to remove their clothes, asked for massages, and eventually requested that they participate in the same sexual act.¹⁶ Unlike those cases, Blue argues, his prior bad acts do not prove a common scheme or plan because they evidence no plan at all; they show only that Blue is prone to abuse when he is angry and intoxicated.

We disagree. The evidence here goes beyond a mere propensity toward drunken violence. The similarities in the manner of Blue's attacks demonstrate a purposeful and deliberate method to punish his victims' perceived transgressions and render them physically and emotionally incapable of resisting his control. Blue did not just beat the women in an explosion of anger. In each case, he used a strikingly similar combination of physical and sexual violence, humiliation, and fear of death through strangulation or suffocation. The similarities in the manner and circumstances of each of the attacks go beyond mere coincidence and are more naturally explained as individual manifestations of a general plan.¹⁷ The court did not abuse its discretion by

¹⁵ 125 Wn.2d at 850.

¹⁶ 150 Wn.2d at 16.

¹⁷ See Lough, 125 Wn.2d at 860; DeVincentis, 150 Wn.2d at 22.

admitting the evidence for that purpose.

Costs of Appointed Counsel

Under RCW 10.01.160, a court may order a criminal defendant to pay the costs incurred by the State in its prosecution if the defendant “is or will be able to pay them.”¹⁸ Blue contends the court erred by imposing the cost of his appointed counsel as a condition of his sentence without determining that he is able to pay. The law is clear, however, that “the time to examine a defendant’s ability to pay is when the government seeks to collect the obligation.”¹⁹ There was no error; Blue’s complaint is premature.

Community Custody Conditions

Blue challenges two of the special conditions of community custody imposed by the court: that Blue pay the costs of Clark’s crime-related counseling and medical treatment and that he hold no position of fiduciary responsibility. Clark never sought restitution, and nothing in the crimes for which Blue was convicted indicates he should be prohibited from occupying a position of fiduciary responsibility. We accept the State’s concession that these conditions were not authorized by law.²⁰

Merger

Where the degree of one charged offense is raised by conduct constituting

¹⁸ RCW 10.01.160(3).

¹⁹ State v. Smits, 152 Wn. App. 514, 216 P.3d 1097, 1101 (2009); State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008).

²⁰ A court may impose “crime-related prohibitions” which “directly relate[] to the circumstances of the crime for which the offender has been convicted” as part of a felony sentence. RCW 9.94A.505(8), .030(10).

another charged offense, the merger doctrine provides that the convictions merge and are not separately punished.²¹ The rape charge in this case was elevated to the first degree by the allegation that Blue inflicted serious physical injury, “including but not limited to serious physical injury which renders the victim unconscious.”²² The second degree assault charge was based on the allegation that Blue strangled Clark.²³ At sentencing, Blue argued, the State conceded, and the court found that the assault merged into the rape conviction. Nevertheless, the court recorded the assault conviction on the judgment and imposed a separate sentence for the offense. The State correctly concedes this was error.

CONCLUSION

We affirm Blue's conviction for first degree rape, and remand for the court to vacate the assault conviction and the improper conditions of community custody.

Edington, J.

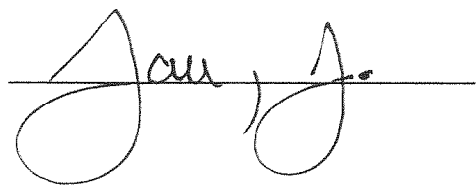
WE CONCUR:

Dwyer, A.C.J.

²¹ State v. Freeman, 153 Wn.2d 765, 773, 108 P.3d 753 (2005); State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979).

²² Clerk's Papers at 327; RCW 9A.44.040(1)(c).

²³ RCW 9A.36.021(1)(g).

A handwritten signature in black ink, appearing to read "Jan J.", is written over a horizontal line. The signature is stylized, with the first letter of each name being a large, looped capital letter.